Service of the within and receipt of a copy thereof is hereby admitted this.....day of January, A. D. 1956.

1-9-56—50

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

MISCELLANEOUS

RULE

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.
No. 15

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals [R. 42-48] is reported at 227 F. 2d 851. The opinions of the Court of Appeals (App. D, pp. 17-23; App. F, pp. 30-34)[1] in connected cases are 227 F. 2d 844 and 227 F. 2d 848. The opinions of the District Court in said cases (App. C, pp. 10-16; App. E, pp. 24-29) are reported in 107 Fed. Supp. 408 and 107 Fed. Supp. 412.[2]

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[1]The reference "App." is to the appendix attached to the petition for the writ of certiorari in the case herein.

[2]There were four related judgments and orders entered by the trial judge against this petitioner in different contempt proceedings arising solely out of petitioner's refusal to answer certain questions during her cross-examination in the Los Angeles Smith Act trial, *United States v. Yates, et al.* As the Court of Appeals indicated (App. F, p. 34, n. 5), determination of the questions here requires a consideration of the companion contempt proceedings and an appraisal of the proceedings in the criminal trial, now on review in this Court. *Yates, et al. v. United States,* Nos. 6, 7, 8. The details of these related proceedings are set forth hereafter in the Statement of the Case.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 26, 1955 [R. 48]. Rehearing was denied on November 2, 1955 [R. 49]. The petition for a writ of certiorari herein was filed November 30, 1955, and was granted January 16, 1956 [R. 49], 350 U. S. 947. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether refusal on the same grounds to answer a series of questions on the same subject and of the same character in the same trial in a single examination may be treated as separate contempts and separately punishable, in the light of the provisions of 18 U. S. C. 401, the Congressional policy behind the enactment of the said statute, the double jeopardy provisions and the due process provisions of the Fifth Amendment.

2. Whether the sentence of one year imprisonment for contempt of court was arbitrarily imposed and contrary to law, and so unnecessarily severe and grossly excessive as to constitute a manifest abuse of discretion, cruel and inhuman punishment, and a deprivation of petitioner's liberty without due process of law contrary to the interest of justice and in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment.

3. Whether the decision and judgment of the court below holding that the trial judge was empowered to impose a punitive punishment of imprisonment for one year in proceedings whose character and purpose were essentially coercive and remedial were contrary to law,

the provisions of 18 U. S. C. 401, and deprived petitioner of her liberty without due process of law in violation of the due process provisions of the Fifth Amendment.

4. Whether the imposition of the sentence of one year imprisonment by the trial judge on the unlawful, irrelevant and extraneous grounds that petitioner after trial and discharge of the jury continued in her refusal to answer the inquiries propounded during her cross-examination for the benefit of the prosecution in some possible future trial, deprived petitioner of her liberty without due process of law contrary to the due process provisions of the Fifth Amendment, and voided the sentence and judgment of contempt.

Statutes and Rules Involved.

The statute and rule involved read as follows:

APPENDIX G.

18 U. S. C., Section 401.

Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

FEDERAL RULES OF CRIMINAL PROCEDURE—RULE 42.

Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdit or finding of guilt the court shall enter an order fixing the punishment.

Statement of the Case.

A. The First Contempt Proceeding.

The contempt proceedings here arose out of unusual circumstances which require a detailed analysis in order to place the legal issues in proper focus. As the Court of Appeals stated: "Since proceedings in contempt are *sui generis,* here the whole course of action in the criminal trial and all the subsequent proceedings must be appraised" (App. F, p. 34, n. 5).

The petitioner was indicted together with thirteen other defendants on December 21, 1951, charged with a conspiracy (18 U. S. C. 371) to violate provisions of the Smith Act (18 U. S. C. 2385). Trial under this indictment commenced on or about February 1, 1952. The prosecution rested its affirmative case on May 21, 1952 [Tr. 8659].[3]

The object of the evidence offered by the prosecution on its direct case was to establish basically two propositions: the first, that the Communist Party advocated and taught the overthrow of the Government by force and violence; the second, that the defendants were members and officials of the Communist Party. Virtually half of the prosecution's case was made up of readings into the record of extensive excerpts from Marxist writings; the other half was made up of documentary and oral testimony which sought to establish that the defendants were long-time officers and members of the Party. Among

[3]The reference "Tr." is to the Reporter's Transcript of Proceedings in the criminal trial on file in this Court, Nos. 6, 7, 8.

the defendants so identified were Frank Spector, Al Richmond, Dorothy Healey, Ernest Fox and Albert Jason Lima. It is relevant to note that at no time during the trial did the said defendants, or their counsel, ever contest the evidence insofar as it purported to establish defendants' membership and officership in the Communist Party.

The prosecution witnesses also testified that they had heard members and subordinate officers of the Party make various statements at Party meetings or classes. Such third persons included, among others, Harry Glickson [Tr. 4443-45]; Leon Kaplan [Tr. 4481, 5440-44]; Ida Rothstein [Tr. 4424-26]; Herschel Alexander [Tr. 7617-27]; and Celeste Strack [Tr. 5519-20]. Again, at no time during the trial did the defendants, or their counsel, dispute the identification of the aforesaid persons as members and officers of the Communist Party.

When the prosecution's case was concluded, ten of the defendants rested their cause [Tr. 10,074-77]. These included the aforesaid Spector, Richmond, Healey, Fox and Lima. Among the four defendants who did not rest was the petitioner.

Petitioner limited her direct testimony to one issue: her own understanding of the principles and programs of the Party and the principles of Marxism-Leninism. She described her own activities in the Communist Party, how she had come to join the Party, and how she had reached her understanding of Marxist principles, and what that understanding was [Tr. 10,159-11,170]. At no time in her direct testimony did petitioner contradict in any way the identification by the prosecution witnesses of the aforementioned persons as members and officers of the Communist Party.

On her direct examination, during a discussion of the role of the State in Marxist theory, petitioner testified that she had witnessed or read of many acts of violence and terrorism against members of the Communist Party which had been left unpunished by officials of government and that she had drawn the conclusion that the policy of the Party with respect to keeping the names of its members confidential was often necessary, that "in order to protect the lives, the families, the jobs and the welfare of these people that there are many times and many people who cannot publicly announce their political affiliations however much they would like to do so" [Tr. 10,517][4]

When petitioner had concluded her direct examination, she was then subjected to a lengthy cross-examination concerning her professed knowledge and understanding of the principles of Marxism-Leninism [Tr. 11,228-740, 11,853-72]. The record is clear that she answered all such questions on cross-examination fully and completely. Indeed, although the cross-examination was permitted to go beyond the matter of petitioner's own understanding and knowledge, petitioner answered all questions directed to her with the single exception discussed hereafter.

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[4]See, for example, Ex. MG, March 31, 1948, "Gang Wrecks Ohio Communist Leader's Home" [Tr. 11,079]; Ex. MI, violence against alleged Communists at Peekskill, New York, at Paul Robeson concert [Tr. 11,080]; Ex. MJ, "Hiawatha 1950 Subversive," film shelved by movie studio because the "Indian chief was for peace" [Tr. 11,080]. See also, earlier evidence of physical and economic reprisals against alleged members of the Communist Party: Ex. JA, account of violence used by law enforcement agencies and vigilante groups against agricultural workers including alleged communists [Tr. 10,220-236]; Ex. JT, similar violence against maritime workers [Tr. 10,453-480]; petitioner's personal knowledge of the use by police officials of force against strikers and alleged communists [Tr. 10,469-74, 10,475-480]; Ex. LS [Tr. 10,504-517]; Exs. LU and LV [Tr. 10,517-520].

Thus, on the opening day of her cross-examination [June 26, 1952, Tr. 11,228, *et seq.*], petitioner was asked whether she knew the aforementioned Harry Glickson [Tr. 11,310]. She answered that she did know him, and had known him since the early 30's [Tr. 11,310]. Since the evidence offered by the prosecution identifying the said Glickson had not been disputed by petitioner and since petitioner conceded that she knew and had known the said Glickson since the early 30's, it appeared that the status of the said Glickson in the Party and petitioner's knowledge thereof was undisputably established. Nevertheless, on the opening day of the cross-examination, the prosecution insisted on further pressing the petitioner. Despite all the aforesaid, petitioner was asked successively if she had ever known Glickson to be a member of the Communist Party [Tr. 11,312]; if it was not true that Glickson during the years 1945 and 1946 had been an active chairman of a Communist club in San Francisco [Tr. 11,313], and if Glickson was in 1950 an active member of the Communist Party [Tr. 11,314]. A similar identifying question concerning the defendant Spector was also asked, the record being in a similar undisputed posture [Tr. 11,318-19].

The sole reason for petitioner's refusal to identify persons as members or officers of the Communist Party was avowedly one of conscience. No question of misbehavior or even rudeness or discourtesy is involved herein. There was no physical obstruction of the trial proceedings, and as has been aforenoted, there was not even any legal obstruction of the prosecution's case before the jury. Whenever she was asked throughout her cross-examination, petitioner always acknowledged that she knew the various persons aforesaid and stated how long she had

known them [Tr. 11,620, 11,621, 11,622, 11,633], and petitioner never disputed the identifying evidence offered by the prosecution. The only one who suffered because of the declination to answer was petitioner herself.[5]

In declining to answer the four questions which sought to compel petitioner to identify Glickson and Spector as members and officers of the Communist Party, petitioner made clear that her declination was based solely on her unwillingness to cause any person "the loss of his job, his income and perhaps be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much anti-communism, I am sorry I cannot bring myself to contribute to that" [Tr. 11,312]. The petitioner added:

> "However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it" [Tr. 11,315].

The District Court on this initial day of cross-examination understood that petitioner's refusal to answer was based solely on conscientious scruples. The trial court stated: "The witness does not want to be an informer" [Tr. 11,337]. "The jury undoubtedly under-

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[5]We refer not only to petitioner's protracted incarceration in the various contempt proceedings, but to the principal trial. The prosecution's testimony on the issue here involved went uncontradicted throughout the Smith Act trial, and was not disputed in counsels' summations to the jury. Without objection, the trial court instructed the jury that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony," 106 Fed. Supp. 906, 929.

stands what it is to be put under the obligation to inform on others. They may feel that they would do the same thing" [Tr. 11,337]. Nevertheless, the prosecution urged upon the trial court at the end of the first day of cross-examination a coercive order which would require petitioner to identify the said Glickson and Spector as Communists [Tr. 11,346-47]. The trial court then stated to petitioner: "The orders of the Court must be obeyed and the power of the Court must be vindicated regardless of what your feelings may be" [Tr. 11-368]. Petitioner was thereupon adjudged in contempt and committed to the custody of the United States Marshal "to be by him imprisoned in a jail type institution until you have purged yourself of your contempt by answering the questions ordered to be answered in each instance or until further order of the Court" [Tr. 11,372-373]. The court held that the petitioner had committed four separate offenses of contempt, but stated to petitioner: "To borrow language from some of the cases, you carry the key to your jail in your own purse. You may purge yourself at any time and be discharged from custody" [Tr. 11,373]. A formal judgment was entered the next day, June 27, 1952 [C. 27, p. 3].[6]

The petitioner was in this manner incarcerated on the first day of her cross-examination and remained jailed for the balance of the trial, a period of about 43 days. All consultations with counsel and preparations of her defense thereafter were necessarily held within the confines of the prison.

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[6]In the Court of Appeals, the transcript of the record in this initial contempt proceeding was numbered 13527 and has been filed with this Court in order to facilitate the appraisal of the subsequent contempt proceedings arising out of the same subject matter. The reference to this transcript is "C. 27".

It is relevant to the questions here presented to follow this civil contempt proceeding to its conclusion. Petitioner was committed, as aforesaid, on June 26, 1952. The criminal trial was concluded on August 6, 1952. Sentence in the principal cause was imposed the next day. The trial court refused bail pending appeal to all defendants. It was necessary to appeal to the Court of Appeals, who remanded with directions to the trial court to fix bail. Again the trial court denied bail. Finally, on August 29, 1952, the Court of Appeals itself fixed bail at $20,000.00 for each defendant pending appeal. On August 30, 1952, petitioner furnished the said bail before another judge, then sitting temporarily in the District Court, but the United States Marshal advised the said judge that he was holding petitioner pursuant to the judgment of civil contempt, and that he could not release petitioner without an order of the court. Petitioner was thereupon permitted to furnish the $20,000.00 bail and ordered released upon her stipulation that she would appear before the trial judge on the question of the "civil contempt" [C. 27, p. 11].

On September 3, 1952, petitioner appeared before the trial judge. This was now about 30 days after the trial, and petitioner had previously been incarcerated about 65 days. The trial judge held that petitioner was still not entitled to her release under the judgment of contempt. In the view of the court, the Government as plaintiff in the concluded criminal trial was still

> "entitled to the benefit of the old answers . . . the purpose in civil contempt is to coerce the witness . . . the purpose is to get her testimony . . . the purpose of coercion is to compel the answer to the question . . . the Government is a litigant

> in the case, for whose benefit the coercive power of the court is exercised on the witness to compel the answers . . . the Court of Appeals may order a new trial . . . there are coercive powers to compel the witness to do what she should have done when she was on the witness stand . . . It isn't a punitive matter . . . as long as the proceedings are pending, and if there is any purpose to be gained by the testimony, by any litigant entitled to it, it seems to me that the power of the court continues. . . . ." [C. 27, pp. 29-41].

These were the dominant views of the trial court throughout all the contempt proceedings.

Petitioner was "ordered back into physical custody of U. S. Marshal pursuant to order of June 26, 1952, *re* civil contempt" [C. 27, p. 12.[7] On September 4, 1952, petitioner surrendered to the Marshal and was returned to jail. The next day, the Court of Appeals stayed execution of the surrender order, and directed petitioner's release on $1,000.00 bail pending appeal [C. 27, pp. 47-8]. Petitioner furnished the said bail on September 6, 1952, and was released.[8]

The Court of Appeals reversed (App. D, pp. 17-23). 227 F. 2d 844. The court held that the contempt "order of June 26, 1952, was valid" (App. D, p. 20), but that "it was error to attempt to coerce this witness with testi-

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[7]A written opinion was subsequently rendered by the trial court (App. C, pp. 10-16). 107 Fed. Supp. 408.

[8]The bail was furnished and petitioner released before another District Judge. Again she was ordered to appear before the trial judge, this time on September 8, 1952, to face another contempt proceeding arising out of the same subject matter. The reason for these "cat and mouse" tactics is made apparent in the discussion which follows here in the Statement of the Case.

fying before a jury which had been disbanded and could not be legally recalled" (App. D, p. 23). The viewpoint of the Court of Appeals, however, with respect to the nature of contempt proceedings in general and its position with respect to the successive contempt proceedings which followed the initial one of June 26, 1952, is exemplified by such statements in this opinion as "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that "a fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner"; that "even the unexpressed purpose of the judge to coerce or punish is no test"; that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19). One judge concurred only in the result (App. D, p. 23).

B. The Second Contempt Proceeding.

The petitioner having been imprisoned for contempt of court at the conclusion of the first day of her cross-examination (June 26, 1952), the same cross-examination continued thereafter, uneventfully, until the third day of her cross-examination was reached (June 30, 1952). The tenor of the prosecution's examination of petitioner was a critical analysis of her knowledge and understanding of the principles of Marxism-Leninism, to which she had testified on direct examination. As the day's session was coming to a close, the trial judge remarked: "She has been under cross-examination, this is the third day, Mr. Neukom, I expect you to be somewhere near the conclusion of it" [Tr. 11,616]. The prosecutor replied that he anticipated "going the remainder of tomorrow" [Tr. 11,616]. The Court stated: "You are wasting time now" [Tr. 11,616]. Whereupon, the prosecutor brought the day's session to a close by again asking the petitioner to

identify the various other aforementioned persons as members and officers of the Communist Party. As previously noted, all of these persons were co-defendants who had rested or third party declarants, identified by prosecution witnesses, without dispute, as members and officers of the Party.

The same question in three different forms was asked concerning Kaplan [R. 3-5];[9] the same question concerning Rothstein [R. 5-6]; Alexander [R. 6-8]; Richmond [R. 8-9]; Healey [R. 10]; Spector (the same person involved in the first contempt order of June 26, 1952; C. 27, pp. 6-7) [R. 10-11]; Fox [R. 11-12]; Lima [R. 12-13]; and Strack [R. 13-14]. Again, whenever asked, petitioner stated how long she had known such persons. She had known Kaplan for about seven years [R. 4]. She had known Ida Rothstein for about fifteen or sixteen years [R. 5]. She knew Alexander [R. 6]. She knew Strack for about eight years [R. 14]. Petitioner never disputed the testimony concerning any person's membership or officership in the Party.

The grounds of petitioner's refusal to identify the aforesaid persons as Communists were precisely the same as they had been on the initial day of cross-examination when she was incarcerated for contempt. She informed the trial judge that she was adhering to her original position, stating: "I am sorry I can't for the same reasons that I advanced last week" [Tr. 11,618]. She told the prosecutor: "This is again the same question, and if you ask it in 20 different forms, if the content is the same, my answer must be the same" [R. 5]. As the prosecutor continued with his list of names, petitioner constantly reiterated her

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[9]The reference "R" is to the Transcript of Record on file in the cause herein.

original position [R. 7] until the trial court finally cut off her statements with the following remarks before the jury: "You have made several speeches and I will ask you to refrain from any further ones. You have said that over and over again. You are instructed to answer the question" [R. 7].

At the conclusion of the day's session and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a). That is my present inclination, and deal with them independently as far as punishment is concerned" [Tr. 11,634]. By mutual consent, immediate action was deferred. Subsequently, and on June 8, 1952, during the trial, the trial judge filed an "Order, Judgment and Certificate of Criminal Contempt" [R. 3-18]. The order recites eleven specifications and includes only the refusals to answer on the third day of cross-examination (June 30, 1952) [R. 3-15].

The jury returned its verdict of guilt in the principal cause on August 6, 1952, and was discharged. All the defendants including petitioner were sentenced the next day to a term of five years imprisonment and a fine of $10,000.00, the maximum permitted by law. On August 8, 1952, petitioner was brought before the trial judge for the purpose of determining what punishment should be imposed for failure to answer the eleven additional questions of June 30, 1952. Before imposing sentence, the trial judge stated, among other things: "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so" [R. 27]; "Anyone can have an appreciation of the sportsmanlike spirit that might prompt a person not to wish to be an

informer" [R. 27]; "Nevertheless, as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it [the contempt] as purged" [R. 28]; "Now the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates of long standing who had worked with her, whatever the proof would show. We do not know" [R. 32][10]; "I think in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances" [R. 36]; "If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court" [R. 37].

The sentence of the trial judge was imprisonment for one year for "each of the eleven separate contempts" [R. 17], the sentences on each count to run concurrently and to commence following petitioner's release from custody following execution of the five-year sentence of imprisonment [R. 17-18].

The Court of Appeals below affirmed this judgment. The Court stated: "These eleven questions each of which

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[10]Mrs. Yates' testimony regarding her own understanding of the meaning of Marxism-Leninism had varied sharply from statements attributed to one of the third party declarants, Glickson. She, however, had testified on cross-examination that she had known Glickson for over twenty years [Tr. 11,310] and never disputed the testimony that Glickson was a member of the Party.

were propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. "The sentence was severe. Its control is not in our province" [R. 47].

C. The Third Contempt Proceeding.

To recapitulate: On June 26, 1952, on the first day of her cross-examination, petitioner declined to identify Glickson and Spector as members and officers of the Communist Party upon the sole ground that she herself could not make such identificaton of any person as a matter of conscience. She was thereupon adjudged in contempt of court and immediately incarcerated. On June 30, 1952, in the same cross-examination, she was asked to make the same identification again of Spector and other co-defendants and third party declarants whose membership and officership in the Party had been undisputedly established. She adhered to her original position and was again adjudged in contempt. On August 8, 1952, two days after the completion of the trial, she was sentenced to one year's imprisonment for the alleged contempt of June 30 as aforesaid. On September 3, 1952, about 30 days after the conclusion of the trial, she was ordered to remain in jail under the original contempt order of June 26. On September 6, 1952, following an order of the Court of Appeals granting bail and staying execution of the order pending appeal, petitioner furnished bail and was released [C. 27, pp. 47-8]. Petitioner, however, was not yet free. The trial judge wished to see her again on September 8, 1952.

On September 8, 1952, counsel for the respective parties, and petitioner, appeared before the trial judge. This was now more than thirty days after the conclusion of the trial. Petitioner learned for the first time that the trial judge proposed to punish her failure to answer the first four questions of June 26 as "criminal contempts." The trial judge stated before imposing sentence: "The Court invoked equitable powers to attempt to force you to answer at that time, Mrs. Yates, but that has apparently been unsuccessful. Do you wish to answer the questions at this time? . . . You could end it very simply, Mrs. Yates, by answering the questions" [C. 35, p. 50].[11]

The sentence of the trial judge was now three years' imprisonment "for your refusal to answer the four questions concerning Harry Glickson and Frank Spector," the sentences to run concurrently [C. 35, p. 52]. The written opinion of the trial judge is reported in 107 F. Supp. 412 (App. E). Upon imposing sentence, the trial judge stated: "I may say, Mrs. Yates, before you leave the bar, that at any time during the period I have jurisdiction to do so, if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence [three years], but any other of the sentences heretofore imposed in the other criminal contempt proceedings [one year] which is No. 22,379 on the records of this Court" [C. 35, p. 53]. To the protests of counsel, the trial judge replied that "in view of the indication the

[11]The transcript of record in the Court of Appeals in this proceeding was numbered 13535 and is referred to here as "C. 35". The transcript has been filed with this Court, as was the transcript numbered 13527 aforesaid, to enable this Court to appraise these successive contempt proceedings in their entirety.

court has given, Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, p. 55].[12]

Petitioner was returned to custody on September 8, 1952. The Court of Appeals ordered her release on her own recognizance pending appeal. She was released on September 11. Petitioner had now been confined for 70 days under the aforesaid contempt orders as aforesaid.

On November 12, 1952, the trial judge, having previously requested the Court of Appeals to remand the judgment for the said purpose, entered an "Order Supplementing 'Certificate, Order and Judgment on Contempt' *nunc pro tunc* as of September 8, 1952" [C. 35, pp. 63-4]. It was ordered that the provisions of the third contempt judgment be supplemented by the additional order that the three-year term of imprisonment follow upon petitioner's release from custody following execution of the five-year sentence, and run concurrently[13] with the sen-

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[12]The trial judge appeared determined after trial to keep petitioner in jail indefinitely as a means of overcoming her scruples and coercing her answers, despite all the indications from the appellate court in granting stays and bail pending appeal that substantial questions of law had arisen from the actions of the trial judge in the various contempt proceedings. Thus, prior to September 8, petitioner had been released on bail after trial pending her appeal from the judgment of conviction in the criminal trial; she had been released on bail pending appeal from the order directing her return to custody under the contempt judgment of June 26; the one year sentence of imprisonment for the alleged contempt of June 30 was to commence after the five year sentence on the Smith Act conviction had been served. Only after these events had transpired, when it appeared that petitioner was to be free pending appeal from all these various judgments and orders, did the trial judge impose a three year sentence of imprisonment for failure to answer the four questions propounded on the first day of cross-examination.

[13]This is another example of the trial judge's concept of the contempt power. When the three year sentence was originally imposed, the intention of the trial judge was to see petitioner immediately incarcerated [C. 50-5]. When this was frustrated by the stay pending appeal granted by the Court of Appeals, the trial judge amended his judgment to provide that the three year term of imprisonment follow execution of the five year sentence in the principal cause.

tence of one-year imprisonment under the second contempt judgment.[14]

The Court of Appeals reversed the three-year contempt judgment (App. F, pp. 30-4); 227 F. 2d 848. The Court stated: "This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were separate and distinct and different corrective and punitive measures, were within the competence of the court" (App. F, p. 31). The Court of Appeals decided, however, that the three-year contempt judgment was invalid because "the notions inherent" in due process of law "will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years" (App. F, p. 34).[15]

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[14]It was further ordered:

"that if and when, at any time prior to the defendant's release from custody following execution of the concurrent three-year sentences of imprisonment here imposed, the defendant shall purge herself of contempt by answering under oath the questions as provided in the 'Judgment, Order and Commitment in Civil Contempt' entered June 26, 1952, in proceeding No. 14291—Civil in this court, and shall be declared so purged by order of this court in said proceeding numbered 14291, then the four concurrent three-year terms of imprisonment herein imposed shall *ipso facto* cease and terminate" [C. 35, p. 60].

[15]Had the court below adopted the view that the refusal to answer the eleven similar questions of June 30 was not a "separate and distinct" contempt from the alleged contempt of June 26, this reason for the reversal of the three year judgment would have equally required a reversal of the one year judgment.

Summary of Argument.

1. The rulings of the courts below are clearly contrary to the deliberate Congressional purpose drastically to curtail the range of conduct which courts may punish as a contempt. The *Peck* trial of 1831 which led to the enactment of the Contempt Act was intended, among other things, to do away with the vice of "double punishment" in contempt proceedings. The lower federal and state courts have, therefore, uniformly held that a court may not successively continue to punish as a contempt the continued adherence of a witness to a position originally stated and for which initial position sanctions have been applied. As this Court has indicated, the test should be—if grave questions of due process, double jeopardy and cruel and inhuman punishment are to be avoided—whether the conduct of the accused was motivated by only a single impulse, whether the thought, purpose and action of the witness were conjoined into a single attitude. Both in contempt cases and the ordinary criminal law, the courts have refused to punish as multiplied offenses the same conduct, act or transaction merely because they affected different persons or things. Nor are separate offenses committed when a witness in a single proceeding refuses to answer similar questions upon the same grounds, even if the single proceeding is continued for a few days. On the record herein, there was no contempt of the court's authority nor a disobedience of its orders within the intendment of 18 U. S. C. 401 when petitioner reiterated the conscientious scruples which led her initially to decline to answer the questions and for which she was immediately punished and confined.

2. A serious question exists in this case as to whether the trial judge was warranted at all in holding that peti-

tioner had committed a punishable contempt. This Court has constantly held that the characteristic upon which the power to punish for contempt must rest is an obstruction to the performance of judicial duty. The record does not reveal an obstruction to the administration of justice in the trial below. There was no disruption of the process of the trial or the court's decorum. The prosecution evidence which established that the specified persons were members and officers of the Communist Party was not disputed by petitioner, the other defendants or their counsel. No one was deceived or misled by petitioner's refusal to make the identification. The only consequence of petitioner's refusal to answer, in the light of the court's instructions, was to injure the effect of her entire testimony upon the jury and to increase the possibilities of conviction. There was simply no conduct of petitioner which obstructed justice here.

In fact, petitioner has been punished, not for a contempt of the authority of the court, but for adherence to a conscientious scruple which she could not forfeit. Petitioner stated that the sole ground for her refusal in essence was that she did not want to be an informer, that she could not identify a person as a member of the Communist Party when such identification might subject the person to economic, social and even physical reprisals. Clearly, this was a claim of conscience, and on this undisputed record, in no sense a flouting of the judge's authority. This Court has recognized that claims of conscience should be respected, especially when the claims of

the State are in no way impaired or denied. Law and history attest to the universal aversion and disdain with which informers are held. Petitioner did not want to do a mean and unworthy thing, and her refusal to be an informer in no way interfered with the administration of justice. Yet for this limited refusal, petitioner has been sentenced to imprisonment for one year in the name of contempt of court.

The consequence of the rulings of the courts below require the critical examination of this Court. If, despite an undisputed record as exists here, an accused in a Smith Act prosecution must sacrifice her conscience at the whim of the prosecutor and a hostile judge or else suffer imprisonment for contempt for seventy days, and then one year, in addition to the complete discrediting of her testimony, the present right of an accused to testify in her own defense (18 U. S. C. 3481) will be subverted. A serious failure of due process of law is presented in these contempt proceedings against petitioner.

These considerations bear importantly on the cruel and inhuman punishment which was imposed on petitioner here by the trial judge in a manifest abuse of discretion. As the *Peck* trial and the Congressional policy behind the Contempt Act reveal, the courts in contempt proceedings are not executing the criminal laws of the land. The power is to be exercised only when an obstruction to justice is plainly established, and the extent of the power is the least possible power adequate to the end proposed. An examination of the history of the Contempt Act, as

well as both state and federal precedents, shows that the trial judge here exceeded all bounds of judicial discretion in imposing the sentence of imprisonment for one year upon petitioner.

Moreover, the sentence of the court was based upon unlawful, irrelevant and extraneous factors. The grossly severe sentence was imposed upon petitioner, as the record plainly shows, because petitioner after trial still continued to decline to answer the questions posed during her cross-examination. After trial, however, petitioner could no longer answer or be compelled to answer, and her punishment for such post-trial refusals exceeded the contempt power of the trial judge, was illegal, and an abuse of discretion.

3. The punitive sentence was illegal for still another reason. The dominant purpose of all the contempt proceedings below was the coercion of petitioner's answers. Every penalty imposed upon petitioner was contingent upon her failure to answer the questions, a decisive characteristic of civil contempt. This Court has held that where the proceedings are essentially civil contempt proceedings, it is a fundamental error to impose punitive punishment therein. The trial judge here patently attempted to evade the exhaustion of his contempt power during trial by imposing successive punitive punishments after trial when the sole purpose of all the proceedings was the coercion of petitioner's answers. Such evasion cannot be countenanced if the drastically limited contempt power is not to become unfettered. The substance and not the form of the proceedings should govern, and the substance of the proceedings here was not criminal.

ARGUMENT.

I.

Petitioner's Statements During the Third Day of Her Cross-Examination That She Adhered to the Same Position Initially Expressed at the Outset of Petitioner's Cross-Examination Was Not a Punishable Contempt.

The power of the trial judge to punish petitioner for contempt of court allegedly committed on June 30, 1952, during the course of petitioner's cross-examination should be considered in the factual and legal setting here presented.

The cross-examination of petitioner began on June 26, 1952. She was asked by the prosecutor to identify two persons as members and officers of the Communist Party, an identification theretofore established by the prosecution and undisputed. Petitioner, in declining solely to make the identification, informed the prosecutor and the trial judge that "however many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it . . ." [Tr. 11,315]. This was the area delimited by petitioner, and upon this basis the prosecutor immediately called for a contempt order and upon this basis the trial judge acted [Tr. 11,337]. Thus, upon the aforesaid record, the trial judge exercised its professed power and jurisdiction to punish for contempt on June 26, 1952, and petitioner was incarcerated.

On June 30, while "still under cross-examination" [R. 44], petitioner was again asked to identify persons as members and officers of the Party, the posture of the undisputed record remaining the same. It was recognized by the courts below that the area of refusal was identical, that petitioner remained "adamant" in adhering to her

original position [R. 45-7]. As petitioner stated: "No. I am sorry I can't for the same reasons that I advanced last week" [R. 46]. The question presented is whether this continued adherence by petitioner to her original position was punishable as a contempt under 18 U. S. C. 401. The Court of Appeals below answered the question in the affirmative. It stated: "These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. No reason was given for the conclusion thus reached.

Since a literal reading of 18 U. S. C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure provides no answer to the question posed in these proceedings, resort should be had to the history and Congressional purpose of the legislation. See, *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218. Moreover, contempts are summary in their nature, and leave determination of their guilt to a judge rather than a jury, and the exercise by federal courts of such a broad power as was exercised here may readily permit inroads into safeguards of liberty afforded by the Constitution. Judicial power must therefore be considered in this constitutional setting. *Cammer v. United States,* 350 U. S. 399, 403-4. Other moral and judicial considerations, discussed hereafter, affect the determination of the issues and bear importantly on the administration of justice in the federal courts. See, *Offutt v. United States,* 348 U. S. 11.

On the record which is presented here, different conclusions as to the allowable "unit of prosecution" appear to have been reached by the courts below. The trial judge adopted the view that each refusal to obey the order of the court was a contempt of its authority and separately

punishable [C. 27, pp. 3-9; R. 3-15; C. 35, pp. 4-10]. The grounds of petitioner's refusal and their identical content were disregarded. The fact that the first three questions on June 26 were only different in form and dealt with the membership and officership of "Harry Glickson" in the Communist Party, was treated as of no consequence [C. 27, pp. 4-6]. The fact that the question concerning "Spector" on June 26 [C. 27, pp. 6-7] was repeated on June 30 [R. 10-11] with only slight variation was ignored. That three similar questions were put on June 30 concerning "Kaplan" [R. 3-5] was also treated as of no significance. The fact that the subject matter of all the questions was the same, the identification of persons as members and officers of the Communist Party, was unnoticed. Each refusal to answer, on the same ground, was in the trial judge's opinion a "contempt" of the authority of the court.

On the other hand, the Court of Appeals appeared to recognize at least that the subject matter of all the questions herein propounded during petitioner's cross-examination was essentially the same. In the ruling on petitioner's three-year sentence, the Court of Appeals, discussing the prior proceedings, stated: "While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of *a similar nature,* and was thereupon sentenced for a year as punishment" (App. F, p. 31) (emphasis supplied). Disregarding this factor, and all other factors aforementioned, the Court of Appeals held that the sentence of a year imprisonment was proper because "those eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. In view of the record, the only conclusion to be drawn from this state-

ment is that the Court of Appeals considered each day of the same cross-examination as a separate proceeding, and that refusals to answer on the third day of cross-examination were therefore "incidents, separate and distinct" from the refusals to answer on the first day of cross-examination, although the grounds of refusal were identical.

It is thus evident that both of the courts below disregarded the position of the accused, the singleness of her attitude, and the identical nature of the grounds of her refusal to answer the questions propounded on cross-examination. The power of the court successively to punish for contempt, with unbridled severity, was made commensurate with the whim of the prosecutor in the repetition of questions which the prosecutor and the court knew would each time elicit the same "conduct." If the Court of Appeals adopted a more restricted view, and this is by no means clear from the opinion, it was only to hold that the prosecutor might appropriately bunch the "similar questions" for different days of the single examination to reach the same result.[16]

It is clear from all the aforesaid that if continued adherence by a witness to an initial position advanced for

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[16]The United States, in opposition to the grant of certiorari, took the position that the power to punish for contempt was to be measured by the number of "different" persons involved in the questions and the fact that the questions were not asked on "the same day" (Br., pp. 11-12). The United States construed petitioner's stated grounds for refusal to answer on June 26 as a "blanket advance declaration of her intention not to be cooperative" which could "hardly preclude separate convictions for refusals to answer specific questions concerning the activities and status of her various co-conspirators in the Communist Party" (Br., p. 11). It was conceded that petitioner's arguments "would have some weight" if the purpose of the series of questions put to petitioner had been "whether petitioner knew any Communists at all" (Br., p. 14).

declining to answer a question can be treated as successive punishable contempts whenever an interrogator puts questions which will necessarily elicit the same response, then the drastic power to punish for contempt will be widely extended.

If legislative intent and Congressional policy in the enactment of 18 U. S. C. 401 are significant factors in the determination of the issue here, it would appear that the courts below have disregarded history and precedent to obtain an unfettered power which the judiciary for more than a century has steadfastly declined to assume in the interests of justice and the appearance of justice. The opportunities for oppression are so manifest, if the views of the courts below are adopted, as to vividly recall the events which led to the enactment of the present contempt statute.[17]

The Contempt Act of March 2, 1831 (4 Stat. 487), from which the present statute is derived, has an unambiguous history. It was enacted on March 2, 1831, the High Court of Impeachment in the case of *United States v. James H. Peck* having rendered its judgment only one month earlier. Stansbury, *Report of the Trial of James H. Peck, Judge of the United States District*

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[17]In opposition to certiorari, the United States argued that the argument of oppression raised by the petition for the writ could be "put aside" (Br., p. 14) because petitioner was not sentenced for life, her sentences on the separate counts being made to run concurrently (Br., pp. 14-15). The inference that it would be time enough for this Court to act when some "oppressive" situation was presented is repelled by the circumstances herein. Because of the trial judge's view as to the "separateness" of the offenses, the punishment imposed vaulted from 70 days to 1 year to 3 years. Moreover, the prison sentences were ordered served after the execution of the 5-year sentence in the principal cause. This may not in its entirety amount to a "life sentence" for petitioner, but it is clear that the issue of oppression is not entirely academic in this case.

Court (1833), p. 474. Thus, the prophecy of Mr. Buchanan, made during the proceedings, was quickly made concrete: "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." (*Id.*, p. 430.) It is impossible to read the record of the *Peck* proceedings without sensing the indignation of the legislators against the exercise of this "despotic power" (*id.*, p. 295), this "double punishment" (*id.*, p. 467) against the victim of Judge Peck's ire.[18] The trial record is replete with references (*id.*, pp. 295-6, 311-12) to the decision of the Court in *Anderson v. Dunn*, 6 Wheat. 204, stressing that the extent of the exercise of the contempt power is "the least possible power adequate to the end proposed" (p. 230).

This Court has never failed to give due deference to the will of the legislators with reference to the Contempt Act. "But the power has been limited and defined by the Act of Congress of March 2d, 1831." *Ex Parte Robinson*, 19 Wall. 505, 510. "That it [the contempt power] may be regulated within limits not precisely defined may not be doubted." *Michaelson v. United States*, 266 U. S. 42, 66. "The Act . . . represented a deliberate Congressional purpose drastically to curtail the range of conduct which Courts could punish as contempt." *In re Michael*, 326 U. S. 224, 227. "In Nye v. United States . . . we reviewed the history of the 1831 Act and found that its purpose was greatly to limit the contempt power of federal courts . . . We consider the judicial power

[18]The sentence for contempt was 1 day imprisonment and suspension from practice for eighteen months (*id.*, p. 52).

in that same setting." *Cammer v. United States,* 350 U. S. 399, 403-4.[19]

In the light of the history of the Act and the consistent rulings of this Court, the lower federal courts have uniformly held that the multiplication of contempt offenses is inconsistent with the legislative policy which led to the enactment of the statute and the judicial policy which administers it. The courts have recognized that no issue of the power of a court to punish as a contempt the wilful refusal of a witness to testify or give evidence is involved in such a situation; the armory of sanctions is not curtailed. All that is involved is whether the court may successively continue to punish as a contempt the continued adherence of the witness to a position originally stated and for which sanctions have been presumably applied, if the original refusal was a contempt at all. Sensing that all attempts to create multiplied "contempts" by varying the questions in form, by dividing the essentially single proceeding into hours, days, or months, or by related variations on the same theme are merely methods of dividing up a single offense and extending the power of a judge beyond its ordinary limits, the courts here constantly refused to sanction such departures from the norm. Since "justice must satisfy the appearance of justice" (*Offutt v. United States,* 348 U. S. 11, 14), the federal courts have refused to approve a course of action which can lead to an intolerable arrogation of unfettered power and possibility of abuse which the Contempt Act was

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[19]"And it is the clear teaching of the *Nye* and *Michael* cases that the grant of summary contempt power, as contained in 18 U. S. C. Section 401, is to be grudgingly construed, so that the instances where there is no right to a jury trial will be narrowly restricted to the bedrock cases. . . ." *Farese v. United States,* 209 F. 2d 312, 315 (C. A. 1, 1954). Cf., *In re Oliver,* 333 U. S. 257; *Offutt v. United States,* 348 U. S. 11; *In re Murcheson,* 349 U. S. 133.

intended to avoid. Since the issue is one of the exercise of judicial power, the courts have been particularly concerned to maintain the judicial restraint so essential in the administration of public justice. *United States v. Orman,* 207 F. 2d 148, 160 (C. A. 3, 1953); *United States v. Costello,* 198 F. 2d 200, 204 (C. A. 2, 1952); *United States v. Kamin,* 135 Fed. Supp. 382, 384 (D. C. Mass., 1955); *United States v. Emspak,* 95 Fed. Supp. 1012, 1014 (D. C., 1951); *United States v. Yukio Abe,* 95 Fed. Supp. 991, 992 (D. C. Haw., 1950). The state court rulings have followed the same pattern. *Fawick Cunflex Co. v. United Electrical, R. & M. Wkrs.,* 92 N. E. 2d 431, 436 (Ohio, App., 1950); *People v. Amorante,* 104 N. Y. S. 2d 807 (N. Y. App. Div., 2d Dept., 1951), 100 N. Y. S. 2d 677, 681 (N. Y. S. Ct., Sp. Term, 1950), 100 N. Y. S. 2d 463 (N. Y. S. Ct., Sp. Term, 1950); *Maxwell v. Rives,* 11 Nev. 213, 221 (1876).

The rationale of the aforesaid decisions is of particular significance. Thus, in *Costello,* the witness, after refusing to give any further testimony, was pressed to answer whether he had had a meeting with one person, whether he was familiar with the testimony of another person, and whether he knew still two other named persons. The Court stated (p. 204):

> "But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer; his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusal to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

In *Orman,* the appellate court stated that the trial court "exhausted its sentencing power" (p. 160) after the initial punishment for contempt. In *Maxwell v. Rives,* the Court stated (p. 221):

> "The statute concerning contempts is a penal statute and must be strictly construed in favor of those accused of violating its prohibitions. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. Otherwise, there would be no limit to the amount in which he might be fined."

See also: *Lawson and Trumbo v. United States,* 176 F. 2d 49, 51 (C. A. D. C., 1949); *McGovern v. United States,* 280 Fed. 73 (C. A. 7, 1922); *State ex rel Parker v. Mouser,* 208 La. 1093, 1104, 24 So. 2d 151, 155 (1945); *Gantreaux v. Gantreaux,* 220 La. 564, 574, 57 So. 2d 188, 191 (1952); *State ex rel. Schoenhausen v. King,* 47 La. Ann. 701, 17 So. 288 (1895).

If the Contempt Act is construed as authorizing double or multiple punishments in situations such as is presented here significant constitutional questions involving due process, double jeopardy and cruel and inhuman punishment are immediately presented. Cf., *Ex parte Lange,* 18 Wall. 163, 173; *In re Bradley,* 318 U. S. 50; *Pennsylvania v. Nelson,* 350 U. S. 497, 509; Note, *Double Jeopardy Clauses* in 65 Yale L. J. 339, 363 (1956); Grant, *Lanza Rule of Successive Prosecutions* in 32 Col. L. Rev. 1309 (1932); Note, *The Identity of Criminal Offenses,* 20 Harv. L. Rev. 642 (1907); *Comment,* 37 Harv. L. Rev. 912 (1924); Note, *Double Jeopardy and the Concept of Identity of Offenses* in 7 Brooklyn L. Rev. 79

(1937); Note, 29 *Chicago-Kent L. Rev.* 348 (1951). Ordinarily, a construction of a statute which leads to grave constitutional questions will be avoided where another valid construction is available. *United States v. C. I. O.*, 335 U. S. 106, 121. Moreover, when this Court construes "statutes defining conduct which entail stigma and penalties and prison," particular emphasis must be placed on the policy which led to the enactment of the statutes. *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221. The trend of this Court's decisions, therefore, even in the more confined area of the ordinary criminal law is away from "harsher alternatives" where law and policy dictate a less onerous result. *Id.*, p. 222.

The *Universal* decision aforesaid is of importance here. There the prosecutor contended that each breach of the statutory duty under Section 15 of the Fair Labor Standards Act owed to each employee was a separate offense. The provisions of the law involved minimum wages, overtime, and record-keeping provisions of the Act. Because of the history and language of the statute, this Court rejected the prosecution's construction of the law. It was held that the statute punishes as one offense "a course of conduct"; "treats as one offense all violations that arise from that singleness of thought, purpose or action which may be deemed a 'single impulse'." *Id.*, p. 224. If the position of the accused, the "managerial decision," remained the same, the offense was single no matter how many underpayments were made and no matter how many employees were so underpaid. *Id.*, p. 224. Only a "wholly distinct managerial decision," involving a different course of conduct, would constitute a different offense. *Id.*, p. 225.

In the instant case, the clear history and policy of the Contempt Act is "drastically" to curtail the power of the trial judges to punish for contempt. The trial judge can punish for contempt only if he certifies that he saw or heard "the conduct" constituting the contempt. Rule 42(a). Clearly there can be no dispute that the conduct of the accused was motivated by only a "single impulse," that "thought, purpose and action" were conjoined into one single attitude, a refusal to identify persons as members and officers of the Communist Party [R. 45-47]. It was certainly not a contempt of the "court's authority" nor a "disobedience" of the "lawful orders" of the trial judge for the witness to reiterate the conscientious scruples which led her to decline initially to answer the questions for which she was punished and confined.[20]

On this record, no support can be found, therefore, for the trial judge's ruling that each refusal of the petitioner to answer on June 30 during the third day of her cross-examination was a separate contempt of the court's authority and separately punishable. The decisions aforestated are all to the contrary. The suggestion of the United States in opposition to certiorari that the offenses could be multiplied by inquiring about the "status" of different persons is equally without merit. In the first place, the record belies the argument. On June 26, the prosecutor, despite the undisputed posture of the case, pressed the

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[20]It has been urged that "the refusal to answer one or many, related or unrelated, questions asked at one proceeding should warrant punishment for but a single contempt because of the singleness of the attitude displayed rather than because of any similarity in the line of interrogation." *Note*, 29 Chicago-Kent L. Rev. 348, 351 (1951). Here the questions were all related, the subject matter being the same—the identification of persons as members and officers of the Communist Party. Here the refusals were all related as well, the subject matter being the same—the refusal to identify persons as members and officers of the Party.

petitioner to answer whether a co-defendant who had rested and a third party declarant were members and officers of the Party. Petitioner answered, and the prosecutor knew, that "however many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it" [Tr. 11,315]. Nevertheless, the prosecutor in the same cross-examination pressed the petitioner to identify four more co-defendants and four more third party declarants as members and officers of the Party, again on an undisputed record and again knowing full well that the same position would be adhered to by petitioner. To hold that "separate offenses" were thus committed by the petitioner requiring separate punishments to successively "vindicate the authority of the court" is to ignore the plain record and to convert a single course of conduct into an infinite number of offenses at the whim of the prosecutor and court. Such procedure enables a judge who has initially felt himself affronted to continue to harass the witness (Cf., *Offutt v. United States,* 348 U. S. 11; *Cooke v. United States,* 267 U. S. 517) and a prosecutor to use a lever of coercion which would dissuade all but the hardiest defendant from taking the stand in his own behalf (Cf., *In re Snow,* 120 U. S. 274, 282; *In re Nielsen,* 131 U. S. 176, 187).

In the second place, the decisions abound that the same transaction or conduct cannot be turned into separate offenses merely because more than one person or thing is involved. As we have shown, in *United States v. Costello,* 198 F. 2d 200 (C. A. 2, 1952), the legislative committee continued to ask the witness whether he was familiar with the testimony given by "Francis McLaughlin"; whether he had met with "William O'Dwyer"; whether he knew "James Moran"; and whether he knew "Frank Bals"

(pp. 203-4)—after the witness had stated that he would not testify until he felt well enough to do so (p. 203). The Court held that the Committee "could not multiply the contempt" after the accused "made his position clear" (p. 204). It should be noted that in *Costello* the area of refusal was entire. In this case, the area was restricted by the petitioner to only one matter in her entire testimony, and this matter was undisputed on the record. Far less reason existed for holding that petitioner had committed the successive offenses of contempt than appeared in *Costello*. The *Costello* decision also serves as a reminder of the dangerous power which would be vested not only in prosecutors and judges, but in all legislative and administrative interrogating bodies if the rulings of the courts below are upheld.

Moreover, the test of "different" persons or things in situations involving the same conduct or transaction has seldom been adopted in the ordinary criminal law. We stress this aspect because at least in the criminal law, no matter how onerous may be successive prosecutions and punishments, some fixed limitation is usually provided as to the term of imprisonment and extent of the fines. Here fine and imprisonment find their limitations in the less ascertainable standards of "gross abuse of discretion" and "cruel and inhuman punishment." The following decisions indicate the trend of the criminal law: *Bell v. United States,* 349 U. S. 81 (transportation of two different women — Mann Act violation — single offense); *Lockhart v. United States,* 136 F. 2d 122 (C. A. 6, 1943) (two persons put in jeopardy during bank robbery—single offense); *Dimenza v. Johnston,* 130 F. 2d 465 (C. A. 9, 1942) (three persons put in jeopardy during bank robbery —single offense); *Smith v. United States,* 211 F. 2d 957

(C. A. 6, 1954) (theft of two letters from mail—single offense); *Robinson v. United States,* 143 F. 2d 276 (C. A. 10, 1944) (transportation of three women—Mann Act violation—single offense); *Colson v. Johnston,* 35 Fed. Supp. 317 (D.C. N.D. Calif., 1940) (robbery of nine mail pouches—single offense); *People v. Allington,* 103 Cal. App. 2d Supp. 911; 229 P. 2d 495 (two lewd acts under vagrancy charge—single offense); *State v. Hoffman,* 78 Ariz. 319, 279 P. 2d 898 (fraudulent sale of different assets—single offense).

The alternative position of the court below and the United States in opposition to certiorari—that each day of the same cross-examination was a separate proceeding and the events of each day therefore "distinct"—is also without validity. The cross-examination of petitioner was a single proceeding or occasion and no less so because the exigencies of time and court procedure enabled the prosecutor to lengthen the examination beyond the duration of a day. To make the exercise of the contempt power dependent upon the length of a prosecutor's cross-examination is to set off on uncharted seas. Moreover, the trial judge instructed the jury (106 Fed. Supp. 929) that an accused who takes the stand in a criminal case waives the right to refuse to answer questions. If this be so, it is doubtful that the United States will argue that this waiver existed only for the first day of cross-examination and could be withdrawn on the third day of the same examination. If each day of the cross-examination be a separate proceeding, the waiver of the privilege in the first proceeding would not require a waiver in the third. 58 Am. Jur., *Witnesses,* Sec. 99, p. 82. In *Ulmer v. United States,* 219 Fed. 641, 647 (C. A. 6, 1915), the charge was perjury by the accused during his

examination concerning the affairs of a bankrupt. The Court stated:

> "One item of false testimony, constituting a crime, is not multiplied into several crimes because an answer is repeated as many times as the question is asked, nor because the answer is varied in form to meet the modified shape of the inquiry; nor can it be important whether an intervening recess is of a few minutes or a few days, so long as the continuity of the testimony is not broken."[21]

It is submitted, therefore, that the trial judge exceeded his power and jurisdiction in entering the judgment of conviction of June 30, and that the court below erred in affirming the one-year sentence of imprisonment. Under the circumstances herein, such judgment and sentence deprive petitioner of her liberty without due process of law, place petitioner twice in jeopardy for the same offense and constitute thereby cruel and inhuman punishment. The exercise of the contempt power here was extended beyond its lawful limits. The judgment should be reversed, it is submitted, in the interest of justice and as a matter of law.

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[21]The United States in opposition to certiorari pointed to *Costello* where the accused was punished separately for his refusal to testify on two different days before the legislative committee. Aside from the difference in the proceedings and examination of witnesses in legislative inquiries and a cross-examination during a criminal trial, it should be noted that Costello himself made the supporting grounds of his refusal separate on each day. On the first day, he produced a doctor's certificate which the Committee rejected (p. 203). On the second day, the same doctor testified that Costello could testify for an hour a day (p. 203). Costello then produced another certificate from his regular physician stating that sustained conversations by Costello would be dangerous to his health (p. 203), and this second certificate from the second physician was again rejected. *Costello* was not decided on the basis of a mere dichotomy in days; it was decided on the basis of the different conduct of the accused in the various committee hearings.

II.

The Sentence of One Year Imprisonment Was Arbitrarily Imposed and Contrary to Law and Constituted a Gross Abuse of Discretion and Cruel and Inhuman Punishment in Violation of the Policy of the Contempt Act and the Due Process Provisions of the Fifth Amendment and the Provisions of the Eighth Amendment.

1. The Judgment and Sentence Imposed Upon Petitioner for the Alleged Contempt Was Arbitrary and Unwarranted and Contrary to Law.

A. The question as to whether the trial judge was warranted at all in holding that petitioner had committed a punishable contempt bears importantly on the issue of the cruelty of the sentence. We treat this question first, therefore, and divide the initial discussion into two categories, legal and factual.

As to the legal phase, it is important to note at the outset that we deal with the exercise of a summary contempt power which in the light of history and Congressional policy has been progressively limited. As the contempt power was first embodied in the Judiciary Act of 1789; as it was then succeeded by the Act of March 2, 1831, following Judge Peck's trial; as it later became Section 268 of the Judicial Code; and now 18 U. S. C. 401, 402, restrictions upon the power of the courts became more stringent. *Matusow v. United States,* 229 F. 2d 335, 339 (C. A. 5, 1956). "The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstructions to it. It is a mode of vindicating the majesty of

law, in its active manifestation, against obstruction and outrage." *Offutt v. United States,* 348 U. S. 11, 14.

This Court has stated that the recognition of a power to summarily punish for contempt "expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." *Ex parte Hudgings,* 249 U. S. 378, 383. Therefore, this Court added in the same case: *"An obstruction to the performance of judicial duty* resulting from an act done in the presence of the court *is, then, the characteristic upon which the power to punish for contempt must rest"* (p. 383) (emphasis supplied). The "presence of that element must be clearly shown in every case where the power to punish for contempt is exerted" (p. 383). If the element of obstruction be clearly present, it is immaterial that the conduct manifested itself in perjurious statements, refusal to testify or physical disturbance. Cf., *Clark v. United States,* 289 U. S. 1. If, however, the conduct, whatever its form, did not "obstruct or halt the judicial process" (*In re Michael,* 326 U. S. 224, 227), then such conduct does not justify exertion of the contempt power. In each case, the Court must examine the facts to determine whether the "essential characteristic" of obstruction is plainly present, not leaving the matter to presumption nor attributing without proof "a necessarily inherent obstructive effect" to the conduct of the accused. *Ex Parte Hudgings, supra,* p. 384. If this fundamental rule be not observed "then the conditions which Congress sought to alleviate in 1831 have largely been restored." *Nye v. United States,* 313 U. S. 33, 49.

As to the factual phase of the matter, there is serious doubt on the record here that petitioner's refusal to identify the named persons as members or officers of the Communist Party amounted to an obstruction to the administration of justice in the trial court. There was no insolence or disrespect to the trial judge, no overt misbehavior which disrupted the process of the trial or the court's decorum. Petitioner stated initially to the trial judge that there was no intent on her part to show any disrespect for the court or for the rulings of the court or for the power or authority of the court. "I stated what I did state because in all conscience I cannot do otherwise. . . ." [Tr. 11,367]. The trial judge recognized that this was the only reason the petitioner declined to answer [Tr. 11,337; R. 27].

There was no delay in the trial because of petitioner's limited refusal, and the trial was concluded with a verdict of guilty as to all the accused. The prosecution had established by extended evidence that the named persons were members and officers of the Communist Party. The trial court so held on motions to strike evidence and for acquittal at the conclusion of the prosecution's case. 106 Fed. Supp. 892, 900; 106 Fed. Supp. 906, 922. "The evidence establishes *without dispute* that the defendants were members and officers or functionaries of varying degrees of standing and activity in the Communist Party during the period covered by the indictment." *Id.*, p. 922. (Emphasis supplied.) So far, therefore, as the prosecution's case before the jury was concerned, the subject matter was indisputably established.

The petitioner at the outset of her cross-examination stated: "I am quite prepared to discuss anything that I did, anything that I said" [Tr. 11,234]. There is no

question that she answered every question posed by the prosecutor fully and at length, except the questions involved here. At no point did she dispute the prosecution's evidence concerning the membership of the named persons in the Communist Party. More than this, so that the prosecution obtained the fullest advantage, whenever she was asked petitioner stated how long she had known the specified persons.

Again, before the jury, the prosecution was able to argue without dispute that the evidence established without denial that the third party declarants and defendants were members and officers of the Communist Party. Cf., *Baker v. United States,* 118 F. 2d 533, 544 (C. A. 8, 1940). Counsel for defendants in their summation to the jury left this issue untouched. And, to make certain that the jury would reach the inevitable conclusion, the trial judge instructed them that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony." 106 Fed. Supp. 906, 929.

What was the principal issue at the criminal trial? It was not whether the defendants were members and officers of the Communist Party. The Communist Party was not the conspiracy charged in the indictment, as the trial judge instructed the jury. 106 Fed. Supp. 934. The fact that a third party declarant was a member or officer of the Communist Party when he made some statement was not binding on the Party, or defendants, as the trial court instructed the jury. 106 Fed. Supp. 936, 937. The principal issue at the trial was whether the defendants had conspired to advocate and teach the overthrow of the Government by force and violence (106

Fed. Supp. 933), and whether the third party declarants were members of such conspiracy (106 Fed. Supp. 936-37).

At most, therefore, the issue as to the membership and officership of these named co-defendants and third party declarants was a subsidiary one. Yet in no way was the determination of this issue "obstructed" or blocked by this petitioner. The only result of her refusal to make the identification was to injure the effect of her entire testimony upon the jury without otherwise being of consequence. No one was deceived or misled by petitioner's refusal to answer. In short, there was no misconduct obstructing justice here, and the court was unjustified, it is submitted, in treating petitioner's position as a contempt of court. See, *United States v. Goldstein,* 158 F. 2d 916, 920 (C. A. 7, 1947); *In re Gottman,* 118 F. 2d 425 (C. A. 2, 1941).

B. In fact, petitioner has been punished here not for a contempt of the authority of the court, but for adherence to a conscientious scruple which she could not forfeit. That is all the record here establishes, devoid of baseless conjectures and surmisals which a court of law cannot entertain. See, *Stack v. Boyle,* 342 U. S. 1, 5-6. All that petitioner stated was that she did not want to be an informer, that she was unwilling to cause any person the loss of his job, his income, and to subject such person to harassment and ostracism at a time when such results might inevitably flow. See the opinion of Justice Douglas in *Ullmann v. United States,* 350 U. S. 422, 440. "The disclosure that a person is a Communist practically excommunicates him from society." *Id.,* p. 453. See also, *Black v. Cutter Laboratories,* 351 U. S. ....., 100 L. Ed. (Adv. Ops.) 681. It is not that petitioner paid no pen-

alty for the judgment which her conscience led her to make. Her entire defense was discredited before the jury by the instructions of the trial judge, and her conviction under a serious charge was facilitated by her own position. Was the additional grossly severe penalty of contempt warranted under such circumstances?

This Court has recognized that coercion and suppression of conscience are never fruitful, that they lead only to resistance and martyrdom and ultimately to a granting of the right. This because all men have recognized ultimately that coercive violence applied "to force conscience is worse than cruelly to kill a man." Sebastian Castellio, follower of Erasmus, quoted in 1 Stokes, *Church and State in the United States,* p. 101. Indeed, man is unable, with honesty, to change his conscience by force or violence or fear alone and without voluntary acceptance. Conscience is not amenable to command. "For . . . there is in our consciences an unwritten, unchanging law 'from which we cannot be set free even by the Senate or by the people." Le Clerc, *The Two Sovereignties,* p. 4. A pervasive recognition of these truths appears in the decisions of this Court. *Girouard v. United States,* 328 U. S. 61; *Cantwell v. Connecticut,* 310 U. S. 296; *United States v. Ballard,* 322 U. S. 78; *West Va. State Board of Education v. Barnette,* 319 U. S. 624.

The petitioner could not bring herself to be an "informer," to identify persons as members or officers of the Communist Party. She did not want such persons to be subjected to economic sanctions, to ostracism and perhaps to physical violence. Clearly, this was a claim of conscience, and its expression in no sense a flouting of the trial judge's authority. "Nearly three centuries

ago, an obscure Englishman named Francis Jenkes was haled before Charles II and his Council for presuming to criticize royal policies at a public meeting. After he had frankly admitted his speech, the King asked him, 'Who advised you in this matter?' Jenkes replied—'To name any particular person (if there were such) would be a mean and unworthy thing, therefore I desire to be excused all farther answer to such question.' But because of his silence he stayed all summer in prison, and his stubbornness helped bring about the great Habeas Corpus Act of 1679. Chafee, *Thirty-Five Years With Freedom of Speech* in 1 Univ. of Kansas L. Rev. 1, 29 (1952). It is this "mean and unworthy thing" which petitioner alone refused to do. For her refusal she has been punished in the name of "contempt of court."

Yet petitioner's scruples were neither frivolous nor novel. The aversion to informers, the disdain for talebearers permeates not only the modern scene, but the multifold historical areas of the past. The courts themselves have exhibited this revulsion toward this unworthy class of persons. *District of Columbia v. Clawans,* 300 U. S. 617, 630; *American Communications Association v. Douds,* 339 U. S. 382, 447, opinion of Justice Black; *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 180, opinion of Justice Douglas; *Peters v. Hobby,* 349 U. S. 331, 351, opinion of Justice Douglas; *Fletcher v. United States,* 158 F. 2d 321, 322 (C.A. D.C., 1946); *Parker v. Lester,* 227 F. 2d 708, 716-724 (C. A. 9, 1955); *Fisher v. United States,* 231 F. 2d 99, 106 (C. A. 9, 1956); *Colyer v. Steffington,* 265 Fed. 17, 25-26 (D. C. D. Mass., 1920); *United States v. Beck,* 138 Fed. Supp. 756, 758 (D. C. Texas, 1956); *United States v. Tijerira,* 138 Fed. Supp. 759, 760 (D. C. Texas, 1956).

Indeed, the cult of the "informer" has become a matter of national concern. More and more it has come to be realized that it is a "dirty business," a "distasteful occupation and one that does not become well a free society. . . . The informer smacks of the police state; and we think that most Americans instinctively shrink from its use." *Editorial,* New York Times, July 8, 1954. The widespread condemnation of informers indicates that they are not the sort of individuals whom responsible people respect. The informer is not an honored member of the community; he is the personification of the traducer, the liar, the rumor monger, the person who sets the community in dissolution "where each man begins to eye his neighbor as a possible enemy. . . ." *Address by Judge Learned Hand,* 86th Convocation of the University of the State of New York, October 24, 1952, at Albany, New York. See also, Chafee, *Free Speech in the United States* (1941), pp. 215-218, 277-80, 489-90; Connelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs* in 60 Yale L. J. 1090 (1951): ". . . generally regarded with aversion and nauseous disdain" (*id.,* p. 1093); Note, *An Informer's Tale* in 63 Yale L. J. 206, 226, 231 (1953); Garrison, *Some Observations on the Loyalty-Security Program* in 23 Univ. of Chicago L. Rev. 1, 10 (1955); Matusow, *False Witness* (1955); *United States v. Flynn, et al.,* 130 Fed. Supp. 412 (D. C. N. Y. 1955), Hearing Before the Subcommittee of the Senate Committee on the Judiciary to Investigate the Administration of the Internal Security Act, S. Res. 58, 84th Cong., 1st Sess. (1955); *Editorial,* New York Times, February 5, 1955; Griswold, *The Fifth Amendment Today* (1955), p. 16.

Nor is this aversion to the informer of recent vintage. The history of civilization is marked by the condemnation

of this "baleful agency" for which mankind has paid a most sanguinary price. In *Ecclesiasticus,* XXI, 31, it is stated: "The tale-bearer shall defile his own soul, and be hated by all." To this solemn truth the wise men of all ages have attested. Gorham, *The Medieval Inquisition* (Lord, 1918); Lea, *A History of the Inquisition of the Middle Ages* (1922), vol. I, p. 371, 381-7, vol. III, p. 191; May, *Constitutional History of England* (1880), vol. II, pp. 275-6; Sergeant, *Liars and Fakers* (Lord), p. 44; Speech of Edward Livingston against the Alien and Sedition Act quoted in Miller, *Crisis in Freedom* (1951), p. 53—"The country will swarm with informers, spies, delators, and all the odious reptile tribe that breed in the sunshine of despotic power."

Finally, as the record shows, petitioner was concerned in all her mature life with problems of the labor movement. The bitter experiences of trade unions in the organization of unorganized workers at the hands of informers has led to universal distaste among working people, particularly for those who reveal the names of members of an organization. "The disgust of workers with this system of espionage is adequately summed up in the phrase 'stool-pigeon'." Brooks, *When Labor Organizes* (1937), p. 69. The constitutions of many trade unions today forbid the revelation of the names of members lest harm be done them. The reason for this flows out of the role of the informer or spy in American trade union history. Commons, *History of Labor in the United States* (1918), vol. I, p. 403, vol. II, pp. 195-97, 337, 339, 415-16; Huber-

man, *Labor Spy Racket* (1937). The National Labor Relations Board will not, as a matter of policy, reveal, or require the revelation of the names of union members. *Matter of Samson Tire and Rubber. Corp. and United Rubber Workers of America,* 2 N. L. R. B. 148, 156; *Matter of R. H. Siskin & Sons and Steel Workers Organizing Committee* (C. I. O.), 4 N. L. R. B. 187, 188, n. 3. In this view the Board has been sustained by the courts. *N. L. R. B. v. New Era Die Co.*, 118 F. 2d 500 (C. A. 3, 1941); *Marlin-Rockwell Corp. v. N. L. R. B.*, 116 F. 2d 586 (C. A. 2, 1941), cert. den. 313 U. S. 594.

Thus, out of this confluence of law and history, indeed out of the mores of the community, the conscientious refusal of the petitioner to identify persons as members and officers of the Communist Party finds substantial support. Considering the undisputed state of the record and the injury which petitioner herself sustained by the observance of her conscience, neither the authority of the court nor the administration of justice would have been affected by permitting petitioner, without further penalty, to maintain her dignity as an individual.

In this connection, one final matter deserves the consideration of this Court. It has not always been true that an accused in a criminal trial was permitted to take the stand in her own defense. That privilege is now granted by 18 U. S. C. 3481. The importance of this reform in the procedural criminal law has been noted by this Court: "In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case.

In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established." *Wilson v. United States,* 149 U. S. 60, 66.

The aforesaid privilege of an accused to establish his innocence is being largely subverted in these causes. Since the decision of this Court in *Dennis v. United States,* 341 U. S. 494, prosecutions in Smith Act cases have largely turned on the question as to whether the proof establishes beyond reasonable doubt the specific intent of each of the accused to overthrow the Government by force and violence as speedily as circumstances will permit. To establish this mental state the practice has developed to inundate the record with proof of membership and officership in the Party and proof of the principles of Marxism-Leninism and the program of the organization. Generally, from this evidence the jury is left free to infer the guilty intent, very inadequate or no evidence being adduced of overt misconduct. Since the "principles" are deduced from writings, and the evidence concerning membership and officership seldom, if ever, disputed, one important opportunity for an accused to rebut these palpably unlawful inferences is to take the stand and testify concerning her activities and state of mind. If, despite the undisputed record, an accused must sacrifice her conscience at the behest of the prosecutor and the judge or else suffer imprisonment for contempt for 70 days and one year, in addition to the complete discrediting of her testimony, the right granted by 18 U. S. C. 3481 will become largely a fiction. Justice is not satisfied by such circumstances. A prosecutor should win his case on the merits; not by the threat of "contempt" which effectively keeps an accused away from the stand.

2. The Sentence of One Year Imprisonment for Petitioner's Alleged Contempt of Court Was a Manifest Abuse of Discretion and Constituted Cruel and Inhuman Punishment.

A. The foregoing considerations point up the shocking severity of the sentence of imprisonment which was imposed upon petitioner here. That it was severe was not disputed by the court below [R. 47]. The court stated, nevertheless: "Its control is not in our province" [R. 47]. It has never been authoritatively held, however, that an appellate court may not revise a sentence in summary contempt proceedings. This Court has afforded relief on more than one occasion. *United States v. United Mine Workers of America,* 330 U. S. 258, 304; *Sacher v. Association of the Bar of the City of New York,* 347 U. S. 388. See, *Offutt v. United States,* 348 U. S. 11, 12-13. "We think, therefore, that in contempt proceedings where the exercise of unlimited discretion is vested in the lower court, an abuse of that power is a proper matter for appellate revision." *In re Gompers,* 40 App. D. C. 293, 334 (1913). And where a sentence by its excessive length or severity is grossly disproportionate to the offense charged, this Court may set it aside as in violation of the "cruel and unusual" punishment provisions of the Eighth Amendment. *Weems v. United States,* 217 U. S. 349, 368-74. Nor is the exercise of judicial discretion unconfined. The notion that "judicial discretion" is some broad, unfettered power free from appellate supervision is without merit. "Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, discretion to be exercised in discerning the

course prescribed by law; and, when that is discerned, it is the duty of the court to follow it." Bowers, *Judicial Discretion of Trial Courts* (1931), Sec. 10, p. 14; *Osborn v. Bank of United States,* 9 Wheat. 737, 865.

If the "course prescribed by law" is to be discerned in this case, the initial starting place is the history which brought the present contempt statute into existence and the reminder of the Court in *Anderson v. Dunn,* 6 Wheat. 204, of the exercise of "the least possible power adequate to the end proposed." As we have previously noted, Judge Peck sentenced Mr. Lawless to 24 hours imprisonment and suspension of practice for eighteen months. This sentence brought forth the immediate condemnation of Congress, and was one of the motivating causes for the enactment of the Contempt Act.

In the Peck impeachment proceedings, Judge Ambrose Spencer, one of the House Managers, stated: "If Judge Peck had been solicitous only to vindicate the authority of the court, and set an example to deter others, a moderate fine would have answered every purpose. This obvious course . . . was disregarded; to glue his vengeance nothing short of the utter ruin of his victim could satiate him. Stansbury, *Report of the Trial of James H. Peck* (1833), p. 304. Charles A. Wickliffe, another Manager, stated: "We arraign before you a Judge who has exerted a power to deprive a citizen of his liberty, for an alleges offence over which he had no jurisdiction, and if he had, he imposed a cruel and disgraceful punishment, under color of law, upon an innocent man, the Judge acting as accuser, witness, judge and executioner." *Id.,* p. 320. Mr. Buchanan urged that Judge Peck had wrongfully adopted the view that "the punishment is measured by no other standard than the excited feelings of the

judge; and in all the wide field of judicial discretion there is no barrier to protect the accused from his fury." *Id.*, p. 437. "Was not this a 'cruel and inhuman punishment'?" argued Mr. Buchanan.

> "Does it not violate the express provisions of the Constitution? Why should he not have been satisfied with the infliction of a fine? Why not punish Mr. Lawless through his pocket? It is not pretended that he had before ever shown any want of respect for that judge. This was the first instance. Even if the judge had possessed the power, a fine of 50 or 100 dollars would have been sufficient to warn others against offending in like manner. This in every point of view would have been infinitely better. But no! Mr. Lawless must be disgraced. He must be sent to gaol." *Id.*, p. 472.

From the earliest date it has been held that the penalty imposed for contempt of court does not partake of many of the elements included in punishment for crime. In most instances the penalty is imposed for offenses which are neither *mala in se* nor *mala prohibita*. In short, a court in contempt proceedings "is not executing the criminal laws of the land." *In re Debs*, 158 U. S. 564, 596.

> "Hence, the elements to be considered by legislatures in establishing punishment for specific crimes, namely, the reformation, if possible, of the criminal, the protection of society, and the deterring of others from the commission of crime, are not necessarily to be taken into account in fixing the penalty for contempt. Contempt proceedings are not to be substituted for proceedings for the punishment of crime, but may be resorted to only when essential to enforce the power of a court whose authority has been defied." *In re Gompers, supra*, p. 334. See the statement of

Judge Taft in *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803, 823 (C.C., S.D. Ohio, 1894).

In the *Debs* case, aforesaid, in accordance with these principles, although an alleged conspiracy to boycott the Pullman Palace Car Company by threatening to call a strike among the employees of any railroad company hauling Pullman cars was enjoined, and although the order was allegedly violated by obstructing the movement of the mails and commerce generally, property destroyed and life deemed jeopardized, still the sentences imposed for contempt ranged only from three to six months in jail. *In re Debs, supra*, p. 573. Again, in *United States v. Shipp*, 214 U. S. 386, 215 U. S. 580, it was found by this Court that a sheriff and his deputies had abetted a mob in lynching a prisoner, and this Court nevertheless imposed sentences of only ninety days and sixty days in jail. If in such extreme cases, sentences of this nature were imposed, it becomes readily observable how cruel and inhuman and grossly excessive was the sentence of one year imprisonment imposed upon petitioner in this case.

What has emerged from the history and the policy of the Contempt Act as well as the limiting principles applicable peculiarly to contempt proceedings is a rule of practice which ordinarily governs both federal and state courts in imposing contempt penalties. That rule of practice generally forgoes fine and imprisonment where doubt exists as to whether any contempt of the authority of the court was committed, or when censure is clearly a sufficiently adequate penalty. See *Matter of Pugh v. Winter*, 253 App. Div. 295, 2 N. Y. S. 2d 9; *Matter of Rothbard v. Brennan*, 263 App. Div. 991, 331 N. Y. S. 2d 361. Even when the obstruction to the administration of justice is plain, courts have usually limited the contempt

sentence to a fine, cognizant of the admonition that "the power to punish for contempt should be exercised sparingly." *Western Fruit Growers v. Gotfried,* 136 F. 2d 98, 101 (C. A. 9, 1943). See also, *Freedman v. State,* 176 Md. 511, 6 Atl. 249; *State v. Tolls,* 160 Ore. 317, 85 P. 2d 366; *United States v. Landes,* 97 F. 2d 378, 381 (C. A. 2, 1938); *Moore v. United States,* 150 F. 2d 323 (C. A. 10, 1945); *Huffman v. United States,* 148 F. 2d 943 (C. A. 10, 1945); *Levinstein v. E. I. DuPont De Nemours & Co.,* 258 Fed. 662 (D. C. Del., 1919). And see, *Penfield Co. v. Securities Ex. Comm.,* 330 U. S. 585.

Imprisonment, therefore, for contempt of court is the exception rather than the rule and is imposed only when the obstruction of the administration of justice is plainly established and the offense to the court's authority extremely serious in character. Yet, as we endeavored to show in the petition for writ of certiorari (App. H), an examination of the decided cases shows that the trial judge here exceeded all bounds of propriety in the prison sentence imposed upon this petitioner. The most serious contempts of court, not in its presence, are punishable only by a maximum prison sentence of six months. 18 U. S. C. 402. The section "ought to have a great weight in punishing criminal contempts under section 385 of 28 U. S. C. A. [now 18 U. S. C. 401]." *Ryals v. United States,* 69 F. 2d 946, 948 (C. A. 5, 1934).[22] Moreover,

[22]In opposition to certiorari, the United States suggested that the one year sentence of imprisonment was ont excessive measured by the twelve months standard set by 18 U. S. C. 192 for legislative contempts. Under 18 U. S. C. 192, an accused is entitled to be tried under an indictment, entitled to confrontation and cross-examination, to subpoena witnesses in his own behalf, entitled to be tried before an impartial judge and jury and convicted only on proof beyond a reasonable doubt. An accused is stripped of all these procedural safeguards in a summary contempt proceeding, and the affronted judge imposes the penalty. Reason and policy would dictate, therefore, the soundness of the *Ryals* decision.

as was also discussed in the petition for writ of certiorari (pp. 31-32), the states have almost uniformly placed statutory limitations upon the power to punish for contempt, a majority of the states providing for a maximum prison term of thirty days or less, with no state exceeding a fixed term of six months (Pet., p. 32).

Thus, when the "course of law be discerned," it appears that the trial judge in this case violated the rule of reason and practice which has been established in the country. In imposing an excessive sentence of one year imprisonment upon petitioner, the trial court abused its legal discretion and punished petitioner cruelly and inhumanly. Especially is this so when it is considered how the alleged contempt arose on this undisputed record; that petitioner had already spent 70 days in jail for her conscientious scruples; and, indeed, had spent more than four months in jail prior to the commencement of the trial because of the failure of the same trial judge to abide by decisions of this Court. See Note, 96 L. ed. 14, 16-17. In most Smith Act trials, where the records were even devoid of all of the aforesaid factors, the sentences were only 30 days imprisonment[23] (Pet., p. 31).

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[23]In the *Dennis* trial, Judge Medina imposed a sentence of 30 days in civil contempt. There the accused while on the stand introduced an exhibit into evidence on his own behalf, but declined to state who the three persons were who prepared the exhibit under his direction. The prosecution maintained that the names of the persons were relevant to the inquiry for impeachment purposes. The information was solely within the knowledge of the accused, and the prosecution was theoretically "blocked." Compare the sentence of 30 days with the sentence of one year upon the accused here where the sole issue was the identification of named persons as members of the Party, entirely undisputed on the record, and where the petitioner willingly answered she knew the said persons and how long she knew them. *United States v. Gates*, 176 F. 2d 78 (C. A. 2, 1949).

B. An additional reason exists for setting aside the sentence of the court herein. As the Statement of the Case makes plain, the severe sentence imposed here arose out of the trial judge's determination to use all the powers of the court, including the power to punish for criminal contempt, as a means of coercing petitioner to answer the questions involved. It should be noted that the contempt sentence here was imposed after the conclusion of the trial when it was no longer possible for petitioner to purge herself because the trial had ended.

Thus, after the conclusion of the trial, the trial judge insisted that the answers of the petitioner would "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App. C, p. 15). Despite the fact that the trial was concluded, the trial judge stated before imposing the one year sentence: "I take it from the defendant's statement that she is as adamant now as she was the day the questions were put" [R. 28]. Thirty days later (on imposing the three year sentence), the trial judge continued to affirm that if petitioner would answer all questions, the court would modify all the three sentences it had imposed. "Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, pp. 53-5].

It is plain that the failure of the petitioner to answer the questions after the end of the trial weighed heavily with the trial judge in fixing the extent of the punishment. Yet these were patently irrelevant and unlawful considerations which dominated the exercise of the court's sentencing power in the alleged criminal contempt proceedings. Neither the trial judge nor the prosecution had any further legal interest in or right to obtain the answers propounded to petitioner on cross-examination during the trial which had previously been concluded. There were

neither parties nor subject matter before the court; no case in which questions could be asked or answers given. Petitioner was sentenced to a year in jail because of her failure to do that which she could no longer perform or be compelled to perform. *Gompers v. Buck's Stove & Range Co.,* 221 U. S. 418; *Parker v. United States,* 126 F. 2d 370 (C. A. 1, 1942); *Loubriel v. United States,* 9 F. 2d 807, 809 (C. A. 2, 1925).

Sentences of contempt entangled with unlawful, irrelevant and extraneous factors violate essential principles of due process and constitute an abuse of judicial discretion when imposed. Punishment so meted out exceeds the contempt power and is illegal. *Oates v. United States,* 223 Fed. 1013 (C. A. 4, 1915); *Gridley v. United States,* 44 F. 2d 716, 743 (C. A. 6, 1930); *Wilborn v. State,* 156 Tex. Cr. 483, 243 S. W. 2d 839 (1953). See also, *Vetterli v. United States,* 344 U. S. 872; *Yasui v. United States,* 320 U. S. 115.

III.

The Trial Judge Was Without Power to Impose Punitive Punishment in Proceedings Essentially Civil in Character and Purpose.

A final reason exists for holding the sentence of one year imprisonment illegal. The contention here is that the dominant purpose of the contempt proceedings was the coercion of petitioner's answers; that the proceedings below were essentially civil contempt proceedings, and that the imposition of a fixed prison sentence in such proceedings was improper, "as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Gompers v. Buck's Stove &*

Range Co., 221 U. S. 418, 449. The dominant purpose of the post-trial contempt proceedings was no different than the purpose of the contempt proceedings during the trial when petitioner was initially confined in "civil contempt."

The fact that coercive powers are exercised to allegedly "vindicate the authority of the court" does not transform the civil contempt into criminal contempt. If a trial judge who has lost the power to coerce the answers of a witness after the conclusion of a trial may revive his power thereafter in order to continue his efforts to coerce the answers by placing the gloss of a criminal contempt judgment over the post-trial proceedings, then the strictly limited powers under Rule 42(a) may become unfettered. For this reason, it is not sufficient for the United States to point to the use of some language by the trial judge in the proceedings characteristic of criminal contempt, as it did in opposition to certiorari, or to urge that "almost any contempt has both civil and criminal characteristics" (Br., p. 15). This Court has stated:

> "It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. *But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character or vice versa." Gompers v. Buck's Stove & Range Co., supra,* p. 443 (emphasis supplied).

When the court below expressed the view that "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that the contempt power is "inherent"; and that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19), it was clearly in error. It was in effect holding that although the trial judge here had lost his power to coerce the answers of the petitioner after the conclusion of trial, still the court could pursue the same objective after trial by imposing fixed jail sentences. But as this Court held in *Gompers,* it is not the imposition of punishment which makes a contempt proceeding criminal; it is the "character and purpose" of the punishment which determines the nature of the proceedings (p. 441). "Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do,' . . . the remedy is one for civil contempt." *Penfield Co. v. Securities & Ex. Comm'n,* 330 U. S. 585, 590. See also, *Bassette v. W. B. Conkey Co.,* 194 U. S. 324, 329; *Doyle v. London Guar. & Acc. Co.,* 204 U. S. 599; *Lamb v. Cramer,* 285 U. S. 217, 220; *Maggio v. Zeitz,* 333 U. S. 56, 67.

Every penalty imposed upon petitioner was contingent upon her failure to answer the questions. The record is unmistakable on this decisive characteristic of civil contempt. Cf., *Maggio v. Zeitz,* 333 U. S. 56, 68. The first civil contempt proceeding during the trial was marked by such statements of the court as it would not be "fair to preclude the government on this situation to establish that relationship" [Tr. 11,350]; "To borrow language

from some of the cases, you carry the key to your jail in your own purse. You may purge yourself at any time and be discharged from custody" [Tr. 11,373]. In the second contempt proceedings after the immediate conclusion of the trial, the trial judge continued to seek the answers for the benefit of the plaintiff: "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates. . . . We do not know. That is the problem, we do not know; . . ." [R. 32]; "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so" [R. 27]; "I hope Mrs. Yates will yet purge herself. I am not interested in imprisoning Mrs. Yates" [R. 37]. Thirty days after the conclusion of the trial, in the third contempt proceeding, the trial judge inquired of petitioner: "Do you wish to answer the questions at this time? You could end it all very simply, Mrs. Yates, by answering the questions" [C. 35, p. 50]; ". . . if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence, but any other of the sentences heretofore imposed in the other criminal contempt proceeding which is No. 22,379 on the records of this court" [C. 35, p. 53]; "Mr. Margolis, in view of the indication the court has given, Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, p. 55].

On the record made in the trial court, it is impossible to escape the conclusion that the principal and dominant purpose of all the aforesaid contempt proceedings was to compel petitioner to answer. Since the trial was over, the court attempted to evade the exhaustion of its contempt power by successive sentences of imprisonment after trial. The essential character of the proceedings were, however, not changed by these punitive punishments ". . . the substance and not the form of the proceeding must govern, and its substance was not criminal." *Hendryx v. Fitzpatrick,* 19 Fed. 810, 812 (C. C. D. Mass., 1884).

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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